TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 98.

W. P. HARRIS, TRUSTEE OF THE ESTATE OF JOHN HARGROVE, BANKRUPT, PLAINTIFF IN ERROR,

vs.

THE FIRST NATIONAL BANK OF MT. PLEASANT, TEXAS.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

FILED MARCH 10, 1908.

(21,061.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 8, 1909.

1

CAPTION.

Be it remembered, That at a regular term of the Honorable District Court of the United States for the Eastern District of Texas, in the Fifth Circuit, begun and holden at Texarkana, Texas, on the 30th day of December, A. D., 1907, and which adjourned *sine die* on the 1st day of January A. D. 1908, at which the Honorable David E. Bryant, United States District Judge for the Eastern District of Texas, presided, came on for trial, Cause No. 3, on the Law Docket of said Court, styled W. P. Harris, Trustee, *vs.* The First National Bank of Mt. Pleasant, Texas, when the following proceedings were had, to-wit:

Plaintiff's First Amended Original Petition.

In the District Court of the United States for the Eastern District of Texas. In Bankruptcy.

In the Matter of JOHN HARGROVE, Bankrupt.

To the Hon. D. E. Bryant, Judge of the District Court of the United States for the Eastern District of Texas:

W. P. Harris, trustee, of Sulphur Springs, and a citizen of the State of Texas, and of said district, brings this amended bill against the First National Bank of Mount Pleasant, a corporation created by, and existing under and by virtue of the laws of the United States of America, whose domicile and principal place of business is at Mount Pleasant in the State of Texas, and within said district.

And thereupon your orator complains and says: that on the 17th day of February, 1906, John Hargrove, of Mount Pleasant, in
2 the County of Titus, and within said district, was duly adjudged a bankrupt by this honorable court upon creditors' petition filed on the 10th day of February, 1906.

That on the 28th day of February, 1906, your orator was appointed trustee in bankruptcy of the estate of the said bankrupt, and was duly qualified as such trustee, and entered upon the performance of his duties as such trustee, and is still acting as such trustee; and your orator states and shows as follows:

That the said Jno. Hargrove, bankrupt, on or about the 15th day of August 1905 was indebted to the said bank in the form of an overdraft in the sum of about $2,000.00, the exact amount not being known to your orator; and that to secure the payment of said overdraft the said John Hargrove delivered into the possession of the said bank as a bailee and pledgee as collateral security the following described notes which are in words and terms substantially as follows, to-wit:

$200.00. MT. PLEASANT, TEX., *Aug 4th*, '05.

On or before the first day of December 1906, we promise to pay to John Hargrove, or bearer, at Mt. Pleasant, Texas the sum of Two Hundred Dollars and no cents, for value received with interest at the rate of eight per cent. per annum from December the first 1905 until paid.

This note is given for part of the purchase money on the following described real estate, viz:

Qpp acres of land out of the S. E. Corner of the Rebecca Kirk survey about 4 miles from Mt. Pleasant, Texas, which said real estate was this day conveyed to C. W. Shelton and W. H. Sisk by Jno. Hargrove and to secure the payment thereof a vendor's lien note is expressly reserved on said real estate.

If not at maturity as hereby stipulated, 10% to be added
3 to the amount of this note as collection fees. It is further agreed that no timber shall be removed from said real estate except as required for improvement and fire wood.

C. W. SHELTON.
W. H. SISK.

$325.00. MT. PLEASANT, TEX., *Aug.* 4, 1905.

On or before the 1st day of Dec. 1907, we promise to pay to Jno. Hargrove or bearer, at Mt. Pleasant, Tex., the sum of $325.00 & No 100 Dollars, for value received, with interest at the rate of 8% per annum from Dec. 1st, 1905 until paid.

This note is given for part of the purchase money on the following described real estate, viz:

100 acres of land out of the S. E. Corner of the Rebecca Kirk H. R. survey about 4 miles S. from Mt. Pleasant Texas, which said real estate was this day conveyed to C. W. Shelton and W. H. Sisk by Jno. Hargrove, and to secure the payment thereof, a vendor's lien is expressly reserved on said real estate. If not paid at maturity as hereby stipulated 10% to be added to the amount of this note as collection fees. It — further agreed that no timber shall be removed from said real estate except as required for improvements and fire wood.

C. W. SHELTON.
W. H. SISK.

$325.00. On or before the first day of Dec. 1908 we promise to pay to Jno. Hargrove, or bearer, at Mt. Pleasant, Tex. the sum of three Hundred and twenty five & No 100 Dollars for value received, with interest at the rate of 8% per annum from Dec. 1st 1905 until paid.

This note is given for part of the purchase money on the following described real estate, viz:

100 acres of land out of the S. E. Corner of the Rebecca Kirk
H. R. survey, about 4 miles S. from Mt. Pleasant Texas,
4 which said real estate was this day conveyed to C. W. Shelton and W. H. Sisk by Jno. Hargrove, to secure the payment

thereof a vendor's lien is expressly reserved on said real estate. If not paid at *security* as hereby stipulated 10% to be added to the amount of this note as collection fees.

It — further agreed that no timber shall be removed from said real estate except as required for improvements and fire wood.

C. W. SHELTON.
W. H. SISK.

$325.00. MT. PLEASANT, TEX., *Aug. 4th*, '05.

On or before the 1st day of Dec. 1909, we promise to pay to Jno. Hargrove, or bearer, in Mt. Pleasant, Tex. the sum of Three Hundred Twenty Five No 100 Dollars, for value received, with interest at the rate of 8% per annum from Dec. 1st, 1905 until paid.

This note is given for part of the purchase money on the following real estate, viz:

100 acres of land out of the S. E. Corner of the Rebecca Kirk H. R. survey, about 4 miles from Mt. Pleasant, Texas, which said real estate was this day conveyed to S. W. Shelton and W. H. Sisk by Jno. Hargrove, and to secure the payment thereof, a vendor's lien is expressly reserved on said real estate. If not paid at maturity as hereby stipulated, 10% to be added to the amount of this note as collection fes. It is further agreed that no timber shall be removed from said real estate except as required for improvements and fire wood.

C. W. SHELTON.
W. H. SISK.

$325.00. MT. PLEASANT, TEX., *Aug.* 15, '05.

On or before the 1st day of Dec. 1910 we promise to pay to Jno. Hargrove, or bearer, at Mt. Pleasant, Texas, the sum of Three
5 Hundred and Twenty Five & No 100 dollars for value received at the rate of 8% per annum from Dec. 1st 1905 until paid.

This note is given for part of the purchase money on the following described real estate, viz:

100 acres of land out of the S. E. Corner of the Rebecca Kirk survey about 4 miles S. from Mt. Pleasant, Texas, which said real estate was this day conveyed to C. W. Shelton and W. H. Sisk by Jno. Hargrove, and to secure the payment thereof, a vendor's lien is expressly reserved on said real estate. If not paid at maturity as hereby stipulated 10% to be added to the amount of this note as collection fees.

It is further agreed that no timber shall be removed from said real estate except as required for improvements and fire-wood.

C. W. SHELTON.
W. H. SISK.

$250.00. MT. PLEASANT, TEX., *Aug.* 15, '05.

On or before the 1st day of Sept. 1907 I promise to pay to the order of Jno. Hargrove or bearer, at Mt. Pleasant, Texas, the sum

of Two Hundred and Fifty Dollar for value received, with interest at the rate of 8% per annum until paid.

This note is given for part of the purchase money on the following described real estate, to-wit: A part of the Rebecca Kirk H. R. survey 4 miles south of the town of Mt. Pleasant, which said real estate was this day conveyed to me by Jno. Hargrove, and to secure the payment thereof, the vendor's lien is expressly reserved on said real estate. If not paid at maturity as hereby stipulated 10% to be added to the amount of this note as collection fees. It is further agreed that no timber shall be removed from said real estate except as required for improvements and fire wood.

W. J. McGEE.

6 $250.00. MT. PLEASANT, TEX., *Aug.* 10, '05.

On or before the 1st day of Sept. 1906 I promise to pay to the order of Jno. Hargrove or bearer, at Mt. Pleasant, Texas, the sum of Two Hundred and Fifty Dollars for value received, with interest at the rate of 8% per annum until paid. This note is given for part of the purchase money on the following described real estate, to-wit: A part of the Rebecca Kirk H. R. survey 4 miles South from Mt. Pleasant, which said real estate was this day conveyed to me by Jno. Hargrove and to secure the payment thereof a vendor's lien is expressly reserved on said real estate. If not paid at maturity as hereby stipulated, 10% to be added to the amount of this note as collection fees. It is further agreed that no timber shall be removed from said real estate except as required for *the* improvement and fire wood.

W. J. McGEE.

Your orator further shows that on the 17th day of February A. D. 1905, the day upon which the said John Hargrove was adjudged a bankrupt, the said overdraft had been paid in full by the said John Hargrove by cash deposited, of his own funds, made with the said bank by the said John Hargrove, bankrupt, from the 5th day of Aug. 1905 to the said 17th day of February 1906. That upon the payment and extinguishment of said overdraft said notes became and thereafter were the absolute property of the said Hargrove, and that the said defendant bank wrongfully withholds the same and refuses to deliver them to the plaintiff trustee.

And your orator further shows that the said described notes, at the time said John Hargrove was adjudged a bankrupt were, and are now, of the aggregate value of Two Thousand Five Hundred ($2500.00) Dollars.

7 And your orator further shows, that at the time the said John Hargrove was adjudged a bankrupt, the defendant had in his possession, and still has in his possession, two certain promissory notes, the dates of which are unknown to your orator, said notes being signed by W. J. McGee as principal, and John Hargrove a surety, and one being for $320.00, and one note for $380.00. That a few days prior to his bankruptcy the said John Hargrove as surety on said notes, paid the same in full to the defendant; that

the said two notes are of the cash value of $700.00 with interest, and your orator became the owner of same by reason of his appointment and qualification as trustee in bankruptcy of the estate of the said John Hargrove, and is entitled to the possession of same.

That since the appointment and qualification of your orator as trustee in bankruptcy as aforesaid, he has on divers days, in person and by writing, demanded of the defendant an accounting of the said property and assets of the said estate in bankruptcy, now in its possession, but defendant absolutely refused to comply with your orator's just and reasonable demand. That defendant has declined to prove up its claim in bankruptcy, or to submit to the jurisdiction of this honorable Court, and to have its rights to, and interest in, said property adjudicated, and now with-olds all of said property from your orator, and from the honorable Court, to the great loss and injury of the said estate.

To the end therefore that your orator may obtain relief to which he is justly entitled in the premises, and that the defendant, the First National Bank of Mt. Pleasant, Texas, may be decreed to surrender and deliver up to the plaintiff or trustee as aforesaid, all and singular the said notes herein before mentioned and set out,
8 so wrongfully withheld and fraudulently concealed from said bankrupt's estate, and that in the event said notes shall not be produced and surrendered then that the said defendant may be decreed to pay to your orator the sum of Three Thousand Five Hundred ($3,500.00) Dollars, the same being the value of the said notes, and all such losses, damages and interest as your orator has suffered by reason of the premises, and that your orator may have such other relief as the nature of his case may require, and that the said First National Bank of Mt. Pleasant, defendant, may, if it can, show why your orator should not have the relief hereby prayed, and may upon oath make answer to all and singular the premises;

May it please your honor to grant unto your orator a writ of subpœna directed to the said defendant, the First National Bank of Mt. Pleasant, Texas, commanding it at a suitable time and place to appear before your honor to make answer to the premises, and to abide by and perform such order and decree as to your honor shall seem meet and agreeable to equity and good conscience.

And your orator shall ever pray, &c.

GEO. Q. McGOWN,
WEBBER & WEBBER,
CHAS. S. TODD,
Solicitors for Plaintiff.

THE UNITED STATES OF AMERICA,
Eastern District of Texas, ss:

On this —— day of —— 1907, before me personally appeared W. P. Harris, the above named plaintiff, who made solemn oath that he had read the foregoing bill of complaint subscribed by him, and knows the contents thereof, and that the same is true of his own

knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

W. P. HARRIS.

Sworn to before me this 4th day of June 1907.

A. O. BRACKETT,
[L. S.] *Clerk U. S. Dist. Court, E. D. Texas.*

9 (Indorsed:) D. Eq. No. 1. U. S. District Court. W. P. Harris, Trustee, Plaintiff, *vs* First National Bank of Mt. Pleasant, Defendant. 1st amended Original Petition. Filed June 4, 1907. A. O. Brackett, Clerk, By C. C. Bumpas, Deputy.

10 *Defendant's Appearance.*

No. 3.

W. P. HARRIS, Trustee of the Estate of John Hargrove, Bankrupt,
vs.
FIRST NATIONAL BANK OF MT. PLEASANT.

In the District Court of the United States, for the Eastern District of Texas, Sitting at Texarkana.

To the Clerk of the District Court of the United States:

Please enter the appearance of the First National Bank of Mt. Pleasant as Defendant in the above suit, and of the firms of Glass, Estes and King, Burford and Burford and S. P. Pounders as its solicitors, specially and for the sole purpose of objecting to the jurisdiction of this court to compell said Defendant to appear and answer herein, because under no provision of the Bankrupt Act is jurisdiction given this court to hear or try or determine the matters set out in plaintiff's pleading, unless by the consent of this Defendant. This defendant does not consent for this suit to be brought or prosecuted in this court and refuses to consent to have said issues tried and determined in this court; and in so far as it is necessary to appear and protest against this court entertaining jurisdiction of this case and for the purpose of refusing its consent to have the court hear and determine this case, and for no other purpose this appearance is entered. And in purport of this plea Defendant refers to the attached motion to dismiss this case because of the refusal of this Defendant to consent to the jurisdiction of this court.

GLASS, ESTES & KING,
BURFORD & BURFORD,
S. P. POUNDERS,
Solicitors for Deft.

(Indorsed:) W. P. Harris, Trustee of the Estate of John Hargrove, *vs.* First National Bank of Mt. Pleasant. Special appearance of Defendant and motion to dismiss. Filed May 6th. A. O. Brackett, Clerk, By W. L. Evans, Deputy.

11 *Plea to Jurisdiction.*

In the District Court of the United States for the Eastern District of Texas, Sitting at Texarkana.

W. P. HARRIS, Trustee, Plaintiff,

vs.

FIRST NATIONAL BANK OF MT. PLEASANT, Defendant.

Comes now the defendant herein, and respectfully shows to the court that heretofore, to-wit: on the 6th day of May 1907, the appearance of the defendant in this case was entered, especially and for the sole purpose of objecting to the Jurisdiction of the court, and of refusing its consent for this court to hear and determine this cause, which appearance was accompanied by a motion to dismiss this suit, on account of the refusal of the defendant to consent to the jurisdiction.

Subject to said special appearance and motion, and without waiving any part of same, but referring to same and making same a part of this plea, this defendant, not confessing all or any of the matters in the bill of complaint to be true, pleads to the jurisdiction of this court, and for cause of said plea to the jurisdiction, shows that it appears from said bill that neither the bankrupt, nor any creditor of the bankrupt, whose estate the trustee, the plaintiff, herein is administering, could have brought or prosecuted this suit in this court, without the consent of the defendant, and the defendant having failed and refused to give its consent, this court is without jurisdiction to further hear or consider said cause.

Wherefore, the defendant prays the judgement of the court whether it shall be compelled to further answer said bill and further prays to be dismissed with its costs, etc.

12 S. P. POUNDERS,
BURFORD & BURFORD,
GLASS, ESTES & KING,
Solicitors for Def't.

(Indorsed:) D. L. No. 3. W. P. Harris, Trustee, *vs.* First National Bank of Mt. Pleasant. Plea to Jurisdiction. Filed June 3, 1907. A. O. Brackett, Clerk, By C. C. Bumpas, Deputy.

13 *Order Transferring Case to Law Docket.*

In the United States District Court for the Eastern District of Texas, at Texarkana.

Equity No. 1.

W. P. HARRIS, Trustee,

vs.

FIRST NATIONAL BANK OF MT. PLEASANT.

JUNE 5TH, 1907.

Ordered that this cause be transferred from the Equity side of this court to the Law side.

Order Providing for Costs.

In the District Court of the United States, Eastern District of Texas.
In Bankruptcy.

In the Matter of JOHN HARGROVE, Bankrupt.

W. P. HARRIS, Trustee,
vs.
FIRST NATIONAL BANK OF MT. PLEASANT.

W. P. HARRIS, Trustee,
vs.
MRS. LOULOU McGEE.

JUNE 6TH, 1907.

It having been made to appear to the Court, that W.P.Harris, Trustee, of the estate of John Hargrove, Bankrupt, has instituted in this Court the two certain suits above styled for the recovery of certain property alleged and claimed by said Trustee to be the property of the said John Hargrove Bankrupt, which suits are still pending in this court.

It is considered and ordered by the Court that the said Trustee W. P. Harris be and he is hereby authorized and required to pay out of any funds in his hands as trustee of said estate, the proper and necessary costs of Court necessarily incurred and that may be
14 incurred by him in the prosecution of said suits, provided all unpaid costs and compensations due to the officers of the Court and to said trustee in the matter of the Bankruptcy of said John Hargrove shall be first paid out of such funds in his hands and the costs of said two suits above named shall be provided for out of such funds only as may remain in his hands after the payment of all such prior costs, compensations and charges in said Bankruptcy proceeding now existing, and retaining in his hands sufficient funds to pay any such costs and compensations, of officers and said trustee as may hereafter arise or be necessarily or properly incurred in said Bankruptcy proceeding.

D. E. BRYANT, *Judge.*

(Indorsed:) D. L. No. 3, D. L. No. 2, W. P. Harris, Trustee, *vs.* No. 3. 1st Nat. Bank Mt. Pleasant. W. P. Harris, Trustee, *vs.* No. 2, Mrs. Loulou McGee. Order for trustee to pay costs. Filed June 6, 1907. A. O. Brackett, Clerk.

15 TERM CAPTION.

December, 1907.

In the District Court of the United States for the Eastern District of Texas, at Texarkana.

Be it remembered, that at a regular term of the District Court of the United States for the Eastern District of Texas, begun and held at the Court Room of said Court in the City of Texarkana, Texas, in said District and in the Fifth Circuit, on Monday the 30th day of December A. D., 1907, it being the fifth Monday in said month, there were present:

The Honorable David E. Bryant, United States District Judge for the Eastern District of Texas; J. W. Ownby, Esq., United States Attorney, by J. B. Dailey, Esq., Assistant; A. J. Houston, Esq., United States Marshal, and A. O. Brackett, Clerk.

WEDNESDAY, *January* 1*st*, A. *D.* 1908.

Court met pursuant to adjournment.

Present: Hon. D. E. Bryant, Judge presiding; Hon. J. W. Ownby, U. S. Attorney, by J. B. Dailey, Ass't; A. J. Houston, U. S. Marshal, and A. O. Brackett, Clerk.

When Court being opened in due form by order of the Judge, the following proceedings were had, to-wit:

In the District Court of the United States for the Eastern District of Texas.

W. P. HARRIS, Trustee,
vs.
THE FIRST NAT'L BANK OF MT. PLEASANT.

Court in session this Jan. 1st, 1908. Thereupon came on
16 regularly to be heard the above styled and numbered suit. Both parties appeared, thereupon came on to be heard the plea to the jurisdiction filed be defendant and its motion to dismiss this suit.

It appearing to the Court that this defendant has not appeared herein except for the purpose of withholding its consent for this case to be tried herein and excepting to the jurisdiction and the court having been advised as to the law and having listened to the argument of counsel, holding the opinion that said motion is well taken and should be sustained it is therefore the order, judgment and decree of the Court that said plea and motion be and the same hereby is sustained and this suit is hereby dismissed for want of jurisdiction in this Court and further that *hte* defendant recover of and from the plaintiff all costs in this behalf incurred for which execution may issue. To which action and ruling and judgment of the court the

plaintiff in open court excepted and asked that his exceptions be noted of record which is here done, and plaintiff gives notice in open court that he will apply for a writ of Error to the Supreme Court of the United States.

(Indorsed:) B'k'ck. No. 3. W. P. Harris, Trustee *vs.* First National Bank of Mt. Pleasant. Order dismissing cause of action. Filed Jan'y 1st, 1908. A. O. Brackett, Clerk, by C. C. Bumpas, Deputy.

17 *Order Certifying Question to Supreme Court of United States.*

In the District Court of the United States for the Eastern District of Texas, Texarkana Division.

No. 3.

W. P. HARRIS, Trustee of Jno. Hargrove, Bankrupt, Plaintiff,

vs.

THE FIRST NATIONAL BANK OF MT. PLEASANT, TEXAS, Defendant.

In the above entitled cause on this Jan'y 1st 1908, I rendered final judgment sustaining defendants demurrer and plea to the jurisdiction of this Court, to which plaintiff duly excepted in open Court and gave notice that he would apply for a writ of Error to the Supreme Court of the United States to revise said judgment.

I therefore, in accordance with Section 5 of the Act of 1891, hereby Certify to the Supreme Court of the United States the question of the jurisdiction of this Court to hear and determine this cause.

This Jan'y 1st 1908.

D. E. BRYANT,
Judge United States District Court,
Eastern District of Texas.

(Indorsed:) No. 3. W. P. Harris, Trustee *vs.* The First National Bank of Mt. Pleasant, Texas. Order certifying question to Supreme Court of United States. Filed Jan. 1st 1908. A. O. Brackett, Clerk.

18 *Assignment of Error.*

The District Court of the United States for the Eastern District of Texas. At Law.

W. P. HARRIS, Trustee of the Estate of John Hargrove, Bankrupt, Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK OF MT. PLEASANT, TEXAS, Defendant in Error.

Assignment of Errors.

1.

The District Court erred in sustaining the defendant's plea to the jurisdiction of the Court and in rendering final judgment dismissing this cause for want of jurisdiction and in holding that the State Court had exclusive jurisdiction, because:

This is a suit by the plaintiff, as Trustee in bankruptcy, against the defendant for the alleged conversion by the defendant and, for the recovery of personal property of the value of exceeding Five Thousand ($5000.00) dollars, alleged to have been transferred and delivered by the said bankrupt to the defendant about eight months prior to the bankruptcy, with intent to defraud his creditors, with the knowledge and participation of the defendant in said fraudulent intent, and was brought in this Court under Section 70f of the Bankrupt Act as amended by the Act of 1903, and concurrent jurisdiction with the State Court is conferred upon this Court by said amendment of 1903 to the Bankrupt Act.

Wherefore the plaintiff prays that the judgment of the District Court be reversed.

CHAS. S. TODD,
J. A. HURLEY,
T. E. WEBBER,
Att'ys for Plaintiff W. P. Harris, Trustee.

(Indorsed:) No. 3. Law. W. P. Harris, Trustee *vs.* First National Bank of Mt. Pleasant, Texas. Assignment of Error. Filed Jan. 25, 1908. A. O. Brackett, Clerk. By W. L. Evans, Deputy.

19 *Petition for Writ of Error and Order Allowing Same.*

In the District Court of the United States for the Eastern District of Texas. At Law.

W. P. HARRIS, Trustee of the Estate of John Hargrove, Bankrupt, Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK OF MT. PLEASANT, TEXAS, Defendant in Error.

Petition for Writ of Error.

To the Hon. Supreme Court of the United States:

Now comes W. P. Harris, Trustee of the Estate of John Hargrove, Bankrupt, plaintiff herein, and says:

That on the 1st day of January A. D. 1908 the District Court of the United States for the Eastern District of Texas, then in session at Texarkana, Texas, entered a final judgment herein in favor of the defendant herein, The First National Bank of Mt. Pleasant, Texas, against this plaintiff, in which judgment and the proceedings had in this cause, certain error was committed to the prejudice of this plaintiff in this:

The District Court erred in sustaining the defendant's plea to the jurisdiction of the Court, and in holding that the said District Court had no jurisdiction of this cause, and in dismissing this cause, as more in detail appears from the assignment of errors which is filed with this petition.

Plaintiff states that the Hon. D. E. Bryant, Judge of the said District Court, on the same day, to-wit, January 1st, 1908, duly certified to the Supreme Court of the United States, the question of jurisdiction only in this cause as follows:

20 In the District Court of the United States for the Eastern District of Texas—Texarkana Division.

No. 3.

W. P. HARRIS, Trustee of John Hargrove, Bankrupt, Plaintiff,

vs.

THE FIRST NATIONAL BANK OF MT. PLEASANT, TEXAS, Defendant.

In the above entitled cause on *the* Jan'y 1st, 1908 I rendered final judgment sustaining defendant's demurrer and plea to the jurisdiction of this Court, to which plaintiff duly excepted in open Court and gave notice that he would apply for a writ of error to the Supreme Court of the United States to revise said judgment.

I, therefore, in accordance with Section 5 of the Act of 1891,

hereby certify to the Supreme Court of the United States the question of jurisdiction only of this Court to hear and determine this cause.

This January 1st, 1908.

D. E. BRYANT,
Judge United States District Court,
Eastern District of Texas.

Wherefore prays that a writ of error may issue in this behalf out of the Supreme Court of United States for the correction of the error so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

CHAS. S. TODD,
Attorney for Plaintiff, W. P. Harris, Trustee.

The writ of error as prayed for is allowed upon the question of jurisdiction only, and amount of bond is hereby fixed at Three Hundred Dollars.

This Jan'y 11, 1908.

D. E. BRYANT,
Judge U. S. District Court, Eastern District of Texas.

21 (Indorsed:) W. P. Harris, Trustee Plaintiff in Error *vs.* First Nation- Bank of Mt. Pleasant, Texas, Defendant in Error. Petition for Writ of Error. Filed Jan. 25, 1908. A. O. Brackett, Clerk, By W. L. Evans, Deputy.

22 *Bond for Writ of Error.*

Know all men by these presents, That we, W. P. Harris, Trustee of the Estate of John Hargrove, a Bankrupt, as principal, and The United States Fidelity & Guaranty Company, as sureties, are held and firmly bound unto The First National Bank of Mt. Pleasant, Texas in the full and just sum of Three Hundred Dollars ($300.00), to be paid to the said The First National Bank of Mt. Pleasant, Texas, its certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and sever-ly, by these presents. Sealed with our seals and dated this 24" day of January, in the year of our Lord one thousand nine hundred and eight. Whereas, lately at a term of the District Court of the United States in and for the Eastern District of Texas at Texarkana, Texas, in a suit depending in said Court, between W. P. Harris, Trustee of the Estate of John Hargrove a Bankrupt, as plaintiff and The First National Bank of Mt. Pleasant, Texas, as defendant, a judgment at law was rendered against the said W. P. Harris, Trustee as aforesaid, and the said W. P. Harris, Trustee as aforesaid, having obtained a writ of Error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said the First National Bank of Mt. Pleasant, Texas, and its attorneys of record citing and admonishing them to

be and appear at a Supreme Court of the United States, at Washington, within 90 days from the date hereof.

Now, the condition of the above obligation is such, That if the said W. P. Harris, Trustee of the Estate of John Hargrove, Bankrupt shall prosecute his writ of Error to effect and answer all
23 damages and costs if he shall fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

P. W. TERRY.

W. P. HARRIS, *Trustee*.
By C. S. TODD, *His Att'y*. [SEAL.]
THE UNITED STATES FIDELITY & GUARANTY COMPANY. [SEAL.]
F. W. OFFENHAUSER,
Attorney in Fact. [SEAL.]

Approved Jan. 25, 1908, by

D. E. BRYANT,
Judge Presiding at said Trial. [L. S.]

(Indorsed:) W. P. Harris, Trustee, Plaintiff in Error *vs.* First National Bank of Mt. Pleasant, Texas. Writ of Error Bond. Filed Jan. 25, 1908. A. O. Brackett, Clerk, By W. L. Evans, Deputy.

24 *Citation in Error.*

UNITED STATES OF AMERICA, *ss.*:

The First National Bank of Mt. Pleasant, Texas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within ninety days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the District Court of the United States in and for the Eastern District of Texas, at Texarkana, Texas, wherein W. P. Harris, Trustee of the Estate of John Hargrove, Bankrupt, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David E. Bryant, United States District Judge, Eastern District of Texas, this 25th day January, in the year of our Lord one thousand nine hundred and eight.

D. E. BRYANT,
Judge Presiding at said Trial.

Marshal's Return.

On this 31st day of January, in the year of our Lord one thousand nine hundred and eight 4 o'clock, P. M., personally appeared W. D. Sanders before me, the subscriber, and makes oath that he delivered a true copy of the within citation to E. S. Lilienstern, Cashier of the First National Bank of Mt. Pleasant, Texas, defendant in error, in person in Mt. Pleasant, Texas.

25

W. D. SANDERS,
Sheriff of Titus County, Texas.

Sworn to and subscribed the 31st day of January, A. D. 1908.

P. B. BRANCH,
County Clerk, Titus County, Texas.

(Indorsed:) (Original) W. P. Harris, Plaintiff, Trustee, in Error *vs.* First National Bank of Mt. Pleasant, Texas, Defendant in Error. Citation in Error. Returned and filed Feb. 3, 1908. A. O. Brackett, Clerk, By W. L. Evans, Deputy.

26

Writ of Error.

The President of the United States, to the Honorable the Judge of the District Court of the United States for the Eastern District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between W. P. Harris, Trustee of the Estate of John Hargrove, Bankrupt, Plaintiff, and the First National Bank of Mt. Pleasant, Texas, Defendant, a manifest error hath happened, to the great damage of the said Plaintiff W. P. Harris, Trustee of the Estate of John Hargrove, Bankrupt, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you *have* the same in the said Supreme Court at Washington, within *90* days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable D. E. Bryant, Judge presiding at said trial, this the 25 day of January, in the year of our Lord one thousand nine hundred and eight.

A. O. BRACKETT,
Clerk United States District Court,
Eastern District of Texas.

Allowed Jan. 25, 1908, by
D. E. BRYANT,
Judge Presiding at said Trial.

27 (Indorsed:) W. P. Harris, Trustee, Plaintiff in Error *vs.* First National Bank of Mt. Pleasant, Texas, Defendant in Error. Writ of Error. Filed January 25, 1908. A. O. Brackett, Clerk, By W. L. Evans, Deputy.

28 *Cost Bill.*

In the District Court of the United States for the Eastern District of Texas, at Texarkana.

D. L. No. 3.

W. P. HARRIS, Trustee,
vs.
FIRST NAT'L BANK OF MT. PLEASANT, TEXAS.

Plaintiff to pay all costs.

Incurred by Plaintiff:

Clerk's Fees.

1907.				
Apr.	2.	To fil. Orig. bill	.10	
		" Iss. Spa. in Chan	1.00	
		" copy " " "	.40	
		" C. & S. to copy	.35	
		" copy bill (40) fo.; c. & s	4.35	
	15.	" Ent'g ret. Spa. in. Chan. & fil	.25	
Jun.	4.	" Fil. 1st amended bill	.10	
	5.	" Ent. ord. trans. case to Law side	.15	
		" Ent. orc. contionance	.15	
	6.	" Fil. ord. for trus-ee to pay costs	.10	
		" Ent. above ord. (3 fo.)	.45	
		" copy of same c. & s. to W. P. Harris	.65	
	9.	" copy of same to Referee, c. & s	.65	
1908.				
Jan.	1.	" fil .10; ent. in min. (3 fo.) 45c. order of dismissl	.55	
	25.	" fil'g pet. for writ of error	.10	
		" fil. writ or error	.10	
		" fil. appeal bond	.10	
		" fil. prea. for transcript	.10	
		" assignment of error	.10	
Feb.	3.	" fil. ret. Cit. and Rec	.25	
		" Transcript 6568 w'ds C. & S	10.20	
				$20.20

Marshal's Fees.

1907.			
Apr.	16.	Paid A. J. Houston, U. S. M. E. D. T	2.00

Incurred by Def't:

Clerk's Fees.

1907.				
May 6.	To fil. app. attorneys		.10	
	" fil. motion to dismiss		.10	
	" Ent'g app'nce def't in R. & Os		.15	
	" Ent'g motion " " "		.15	
Jun- 3.	" fil. plea to jurisdiction		.10	
Apr. 2.	" Ent'g app'nce def't's Att'y		.10	
Dec. 31.	" fil. plea to jurisdiction		.10	.80
	Total costs in case			$23.00

TEXARKANA, TEXAS, *Feb.* 8, 1908.

I hereby certify the above bill of costs to be just and correct.

[Seal United States District Court, Eastern District of Texas.]

Attest:

A. O. BRACKETT, *Clerk.*
By W. L. EVANS, *Deputy.*

29 *Clerk's Certificate.*

In the District Court of the United States for the Eastern District of Texas, in the Fifth Circuit, Holding Sessions at Texarkana, Texas.

I, A. O. Brackett, Clerk of the United States District Court for the Eastern District of Texas, do hereby certify that the foregoing is a true and correct copy of the record; assignments of error and all proceedings in the case numbered 3 on the Law Docket of said Court at Texarkana, entitled W. P. Harris, Trustee *vs.* The First National Bank of Mt. Pleasant, Texas, as the same now appears on file and of record in my office at Texarkana, Texas.

Witness, my hand officially and the seal of said Court, at Texarkana, Texas, 8th day of February, A. D. 1908.

[Seal United States District Court, Eastern District of Texas.]

A. O. BRACKETT, *Clerk,*
By W. L. EVANS, *Deputy.*

30 UNITED STATES OF AMERICA, *ss:*

To the First National Bank of Mt. Pleasant, Texas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within ninety days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the District Court of the United States in and for the Eastern District of Texas at Texarkana, Texas, wherein W. P. Harris, Trustee of the Estate of John Hargrove, Bankrupt, is plaintiff in error and you are defendant in error, to show cause, if any

there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David E. Bryant, United States District Judge, Eastern District of Texas, this 25th day of January, in the year of our Lord one thousand nine hundred and eight.

[Seal United States District Court, Eastern District of Texas.]

D. E. BRYANT,
Judge Presiding at said Trial.

31 On this 31st day of January, in the year of our Lord one thousand nine hundred and eight, 4 o'clock p. m., personally appeared W. D. Sanders before me, the subscriber, and makes oath that he delivered a true copy of the within citation to E. S. Lilienstern, Cashier of the First National Bank of Mt. Pleasant, Texas, defendant in Error, in person in Mt. Pleasant, Texas.

W. D. SANDERS,
Sheriff of Titus Co., Texas.

Sworn to and subscribed the 31st day of January, A. D. 1908.

[Seal County Court of Titus County, Texas.]

P. B. BRANCH,
County Clerk, Titus Co., Tex.

[Endorsed:] (Original.) W. P. Harris, Trustee, Plaintiff in Error, *vs.* First National Bank of Mt. Pleasant, Texas, Defendant in Error. Citation in Error. Returned and Filed Feb. 3, 1908. A. C. Brackett, c'k. By W. L. Evans, Dep.

32 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Eastern District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between W. P. Harris, Trustee of the Estate of John Hargrove, Bankrupt, Plaintiff and The First National Bank of Mt. Pleasant, Texas, Defendant, a manifest error hath happened, to the great damage of the said Plaintiff W. P. Harris, Trustee of the Estate of John Hargrove, Bankrupt, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within

90 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 25 day of January, in the year of our Lord one thousand nine hundred and eight.

[Seal United States District Court, Eastern District of Texas.]

A. O. BRACKETT,
Clerk United States District Court,
Eastern District of Texas.

Allowed Jan. 25, 1908, by
D. E. BRYANT,
Judge Presiding at said Trial.

33 [Endorsed:] (Original.) W. P. Harris, Trustee, Plaintiff in Error, *vs.* First National Bank of Mt. Pleas't, Texas, Defendant in Error. Writ of error.

34 [Endorsed:] D. L. No. 3. W. P. Harris, Trustee, Plaintiff in Error, *vs.* The First National Bank of Mt. Pleasant, Defendant in Error. Transcript of the record. From the U. S. District Court of the Eastern District of Texas, Texarkana Division. A. O. Brackett, Clerk, By W. L. Evans, Deputy.

Endorsed on cover: File No. 21,061. E. Texas, D. C. U. S. Term No. 98. W. P. Harris, trustee of the estate of John Hargrove, bankrupt, plaintiff in error, *vs.* The First National Bank of Mt. Pleasant, Texas. Filed March 10th, 1908. File No. 21,061.

Office Supreme Court, U. S.
FILED.
JUL 24 1909
JAMES H. McKENNEY,
CLERK.

NO. 98.....

IN THE

SUPREME COURT OF THE UNITED STATES

W. P. Harris, Trustee,.....Plaintiff in Error,

vs.

The First National Bank of Mt. Pleasant, Texas,.....Defendant in Error.

Error to the United States District Court for the Eastern District of Texas.

BRIEF FOR PLAINTIFF IN ERROR.

CHAS. S. TODD,
GEO. Q. McGOWN,
JNO. A. HURLEY,
T. E. WEBBER,
Attorneys for Plaintiff in Error,
W. P. Harris, Trustee.

TEXARKANIAN, TEXARKANA

NO.....

IN THE

SUPREME COURT OF THE UNITED STATES

W. P. Harris, Trustee,.....Plaintiff in Error,

vs.

The First National Bank of Mt. Pleasant, Texas, ...Defendant in Error.

Error to the United States District Court for the Eastern District of Texas.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This suit was originally filed in the United States District Court as a bill in equity. On June 4, 1907, plaintiff filed his amended bill or petition, and the Court treating it as an action at law for recovery of personal property or conversion, ordered the case to be transferred to the Law Docket, which was done without objection from either side. (Tr. p. 13).

It is in effect an action by W. P. Harris, as Trus-

tee of the estate of John Hargrove, a bankrupt, as plaintiff against the First National Bank of Mt. Pleasant, Texas, as defendant, for the recovery of certain notes and choses in action, or $3,500.00, their alleged value, said notes alleged to belong to the estate of the said bankrupt, and to have been wrongfully withheld, appropriated and converted by said defendant bank. It was brought in the Bankruptcy Court under Section 70 **e** of the Bankrupt Act as amended February 5, 1903, which reads as follows:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a **bona fide** holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a **bona fide** holder for value. **For the purpose of such recovery any Court of bankruptcy as hereinbefore defined, and any State Court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.**" The last clause, italicised above, constitutes the amendment of February 5, 1903.

The defendant appeared specially and filed its plea to the jurisdiction of the Court by way of demurrer, (Tr. 11-12) which came on to be heard January 1, 1908, and was by the Court sustained, and the cause

dismissed; to which the plaintiff excepted. (Tr. 15-16). On the same day the trial Judge certified the question of jurisdiction only to this Court for decision in accordance with section 5 of the Act of 1891, (Tr. 17), and writ of error was duly allowed and perfected.

The plaintiff in error assigns as error the ruling and action of the Court in sustaining the plea to the jurisdiction and dismissing the cause. (Tr. 18); and the single question is: Did the Court have jurisdiction of the case?

Brief and Argument.

Under Section 70 **e** of the Bankrupt Act as amended by the Act of 1903, the District Court of the United States, being a Court of Bankruptcy, has jurisdiction of this cause; and the Court erred in holding that it had no jurisdiction and in dismissing the case upon the plea to the jurisdiction.

The correctness of the above proposition is the sole question in this case.

There is a conflict of decisions in the inferior Federal Courts upon this question. Of course it is conceded that prior to the amendment of 1903, under the decision of this Court in **Bardes** vs. **Bank**, 178 U. S. 544, the Bankrupt Court had no jurisdiction of this character of suit; but our contention is that the amendment of 1903 was enacted for the express pur-

pose of conferring, and does confer, such jurisdiction, concurrent with that of the proper State Court.

The precise question involved here came before Judge Adams, of the Eastern District of Missouri in **Gregory** vs. **Atkinson**, (127 Fed. Rep. 183), and Judge Adams, by a peculiar and intricate course of reasoning, held that the amendment of Section 70 **e**, conferring concurrent jurisdiction on Courts of bankruptcy, did not do what by its plain terms it purported to do, and conferred no jurisdiction on Courts of Bankruptcy, **except by consent of the defendant.** This case has been followed and approved by the Circuit Court of Appeals of the Fifth Circuit, in **Hull** vs **Barr,** 153 Fed. Rep. 945.

On the other hand, in **Hurley** v. **Devlin,** (149 Fed. Rep. 268), Judge Pollock of the Kansas District, after fully reviewing in an able opinion, and to our mind, completely overturning the reasoning of Judge Adams in **Gregory** v. **Atkinson**, upholds the jurisdiction of the Court under the amended Act.

It is worthy of note that this opinion of Judge Pollock was manifestly not before the Circuit Court of Appeals of the Fifth Circuit, nor called to its attention, in considering the case of **Hull** v. **Barr, supra,** in which that Court sustained and followed Judge Adams; it was not cited in the brief of counsel, nor referred to by the Court. Probably Judge Pollock's opinion in **Hurley** v. **Devlin** had not been reported at

the time of the submission of the case of **Hull** v. **Barr.**

Aside from the undoubtedly superior reasoning of Judge Pollock in giving effect to the amendment, we respectfully submit that this Court has clearly intimated that the amendment conferred concurrent jurisdiction upon the Courts of bankruptcy. In **Bush** v.**Elliot,** 202 U. S. 483, this Court, after discussing and quoting from the Bardes case, says:

"Under clause **b** (of section 23) the jurisdiction of all Courts is affected, and this clause pertains to suits begun by the trustee, and he is not **(prior to the amendment of February 5, 1903),** permitted to prosecute suits unless by the consent of the defendant, except where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted." The parenthetical reference to the amendment of 1903 seems to imply that **since** the amendment a trustee **is** permitted to bring and prosecute such suits in the bankruptcy Court without the consent of the defendant.

In the still later case of **Frank** v. **Volkommer,** 205 U. S. 521, a suit to set aside a chattel mortgage for fraud was brought by the trustee, before the amendment of 1903, in the State Court. It was contended by defendant that the bankruptcy Court had exclusive jurisdiction and that the State Court was without jurisdiction. This Court, after referring to the stat-

ute, the Bardes case and the amendment of 1903, said:

"The amendment gave the bankruptcy Court **concurrent** and not exclusive jurisdiction." And later in the opinion said: "**At that time** (i. e. before the amendment), there being no diversity of citizenship, and no such possession as might lead to a different result, the suit could **only** be commenced **in the State Courts;**" implying the converse, that **after** the amendment such a suit might be brought in the bankruptcy Court.

It occurs to us that the decisions of Judge Adams and of the Circuit Court of Appeals of the Fifth Circuit simply eliminate and **repeal** the amendment of section 70 **e**; while the contrary view, upholding the concurrent jurisdiction of the bankruptcy Court, gives effect to the intent of Congress as expressed in the amendment, and would not necessarily destroy Section 23 **b**, but leaves the inhibition thereof in force as to all suits **not of the character designated in sections 60 b, 67 e and 70 e,** to each of which sections the amendment conferring concurrent jurisdiction on the bankruptcy Courts is appended in the same identical language. If there be a necessary conflict between the amendments to section 23 **b** and 70 **e**, the "last expression of the legislative will"—the amendment to section 70 **e**—ought to prevail. See

Thomas v. Roddy, 19 Am. Bkr. Rep. 873-1
In Re Coffey, " " " " 162.

It may not be improper to add that "looking to the old law, the evil and the remedy proposed" as a familiar rule of construction, it is difficult to conceive a reason for conferring jurisdiction on the bankruptcy Court in the class of cases mentioned in Sections 60 b and 67 e which would not apply with equal, if not greater, force to those cases designated in section 70 e. This Court, construing the old law, had held in the Bardes case that the bankruptcy Court had no jurisdiction of any such cases, whether brought under section 60 b, 67 e, or 70 e, "unless by consent of the defendant," no such jurisdiction having been conferred, and section 23 b expressly confining the trustee in bringing such suits to "the Courts where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted." This was deemed a defect in the law,—an evil which Congress designed and undertook to remedy by the amendments of February 5, 1903. Did Congress intend to remedy this evil only partially, as to the class of suits named in sections 60 b and 67 e? If so why amend Section 70 e at all? Clearly there are as many and as good reasons why the bankruptcy Courts should be given at least concurrent jurisdiction in the cases embraced in this section as in those included in the two former sections.

We respectfully submit that the Court below erred in sustaining the plea to the jurisdiction and

dismissing the case, and that the judgment should be reversed and the cause remanded for trial on the merits.

Chas S. Todd
Of Counsel

CHAS. S. TODD,
GEO. Q. McGOWN,
JNO. A. HURLEY,
T. E. WEBBER,
Attorneys for Plaintiff in Error,
W. P. Harris, Trustee.

Office Supreme Court, U. S.
FILED.
SEP 29 1909
JAMES H. McKENNEY,
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

No. 98.

W. P. Harris, Trustee of the Estate of John Hargrove, Bankrupt ....Plaintiff in Error,

vs.

The First National Bank of Mount Pleasant, Texas, ...Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

HIRAM GLASS,
W. L. ESTES,
JOHN J. KING,
A. L. BURFORD,
Attorneys for Defendant in Error.

TEXARKANIAN, TEXARKANA.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

No. 98.

W. P. Harris, Trustee of the Estate of
John Hargrove, Bankrupt ....Plaintiff in Error,

vs.

The First National Bank of Mount Pleasant,
Texas, ...Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

The petition filed in this suit alleges substantially that John Hargrove of Mt. Pleasant, Texas, was adjudged a bankrupt on the 17th day of February, 1906, and that about the 15th day of August, 1905, he was indebted to the Bank in the form of an overdraft in the sum of $2000.00; that to secure the payment of said overdraft, the said Hargrove delivered into the possession of the bank, as a bailee and pledgee as collateral

security, certain notes that were fully and in detail set out in the petition; that at the time Hargrove was adjudged a bankrupt the overdraft had been paid in full by cash deposited in the bank by Hargrove between the 5th of August, 1905, and the 7th of February, 1906.

Further that at the time Hargrove was adjudged a bankrupt, the bank had in its possession two certain promissory notes which had been signed by one W. J. McGee, as principal, and by John Hargrove, as surety, one of the notes being for $320.00 and the other note for $380.00; that a few days prior to the bankruptcy, the said Hargrove paid off the said notes in full, and thereby became the owner of same.

The suit is for a decree requiring the bank to surrender and deliver up the notes placed as collateral security to the overdraft and also the notes that had been paid by Hargrove as surety, or for judgment against the bank for $3500.00, the value of the notes. (Trs. of record Pgs 4 & 5.)

A special appearance was entered by the bank for the sole purpose of objecting to the jurisdiction of the court to require the defendant to appear without its consent, and also for the purpose of withholding and refusing its consent to have the issue tried and determined in the Federal Court. (Trns of record P 96.)

Following the special appearance and based upon the defendant's refusal to consent to have the issue tried in this court, a plea to the jurisdiction was filed

and sustained by the trial judge. (Trns of record Pgs 7 & 8.)

I.

On the threshold of this case we differ with opposing counsel relative to the application of section 70 subdivision e to the facts that are here involved. It does not occur to us that the subdivision of said section, which is quoted in full in the brief of plaintiff in error, was ever intended to apply, or that its language will admit of it applying to a suit for conversion.

It is quite true that the trustee is vested with the title of the bankrupt in the notes that are herein sued for and that he has the right to sue for the unlawful detention of them. (Burns vs. O'Gorman Company, 150 Fed. 227.) But such title is vested and such right of action is given by the fifth and sixth paragraphs of subdivision a of Section 70 and not by subdivision e, as is claimed by the plaintiff in error.

Subdivision e relates to suits by a trustee to avoid a transfer of the bankrupt's property for the same reasons that a creditor might have avoided such transfer. It involves the idea that something has been done in fraud of the creditors' rights and that the transaction sought to be set aside took place under circumstances that made it at least voidable by the creditors; but clearly where property has been placed as collateral security and the debt to secure which it was given has been paid, then the suit which the creditor would in-

stitute, upon the refusal to surrender it, would be for the recovery of the property itself, or a suit for conversion, as it is claimed this suit is, and not an effort to avoid the transfer. And his right to recover would be based on those paragraphs of subdivision a of Section 70, which vests the trustee with the title that the bankrupt had in the property and authorize him to enforce "rights of action arising from the unlawful detention of his property."

Bankruptcy Act July 1st, 1898, Section 70 a Subdivisions 5 and 6.

Hull vs. Burr, 153 Fed. 949.

Burns vs. O'Gorman Co., 150 Fed. 227.

Thomas, Trustee, vs. Roddy, 19 Am. B. R. 876.

Collier on Bankruptcy, 7th Ed. pp. 807-812-815-816.

Fraud, either actual or constructive, is the very essence of the right of a creditor to avoid a transfer. Collier says:

"Sub-section e is the corollary of 67b and means simply that if a creditor could have avoided any transfer (not merely a lien) under the laws of the state, the trustee can do the same." (Collier on Bankruptcy, 7th Edition, p. 842. Mueller vs. Bruss, 8 Am. B. R. 442.)

The Supreme Court of Texas has said:

"The hindrance and delay contemplated by the Statute has in it the element of fraud, and if a hindrance and delay be found in any case to be free from this element, then it is not of that character which under the statute vitiates conveyances." (Ellis vs. Valentine, 65 Texas 546.)

There is nothing in the pleading that shows why

the transfer should be set aside or that recites any acts amounting to, or implying fraud, or that sets forth any circumstances that lift the case out of the ordinary suit to recover property from a defendant unlawfully withholding it from its owner. The entire suit is nothing more than a charge to the effect that property which came into the possession of the bank in an ordinary and in a perfectly lawful fashion, is now detained by the bank after the obligation to secure which it was originally placed there, has been fully met.

It follows therefore that while this is a controversy arising in bankruptcy, as distinguished from a proceeding in bankruptcy, it is not a suit under either subdivision b of section 60 or subdivision e of section 67 or subdivision e of section 70, and that the District Court of the United States neither before nor after the amendment, and neither with nor without the consent of the defendant, had jurisdiction to determine the issue. The Circuit Court alone, under the provisions of law, regulating and defining its jurisdiction, could decide it. (Sec. 23 subdivision a Bankruptcy Act. Bardes vs. Hawarden Bank, 178 U. S. Hull vs. Burr, 153 Fed. 948.)

The case of Hull vs. Burr, 153 Fed., is an authority in point. The petition there alleges that the bankrupt had executed a deed to certain real estate conveying same to the defendant in the suit and that in effect said deed was intended as a security for money that at the

time of the execution of it was advanced and that there after might be advanced to the bankrupt, and further, that an instrument or agreement of defeasance was executed at the same time that the deed was delivered, wherein the defendant agreed to reconvey the land upon the payment of the note. The charge was that the defendant refused to reconvey the property or advise the amount of the indebtedness, and the suit was for the purpose of ascertaining the indebtedness and requiring the defendant to return the property, which was alleged to be of much greater value than the amount of the loan to the bankrupt.

The Circuit Court of Appeals decided that the said suit did not arise under subdivision e of section 70 and in considering the question, after quoting the said subdivision in full, said:

"Such jurisdiction as is conferred by this language relates to suits by the trustee to 'avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided.' The petition of the trustee in the instant case does not seek to avoid a transfer. It does not allege that the deed to Hull was made under circumstances that made it voidable at the suit of his creditors. In fact it is not alleged in the petition that the corporation owed any debts at the date of its transfer to Hull. No charge of fraud against creditors is made. On the contrary, it is alleged that the deed to Hull was based on a large consideration, not less than $25,000.00. A careful consideration of the trustee's petition convinces us that it was not intended as a suit under section 70-e, and that subdivision has not been cited by learned counsel for the trustee as conferring jurisdiction."

II.

Under the Bankruptcy Act as amended by the Act of 1903, a District Court of the United States has jurisdiction of suits brought by the trustee, when the consent of the defendant is withheld, only in such suits as the bankrupt might have brought or prosecuted if proceedings in bankruptcy had not been instituted, except in suits for the recovery of property under section 60 subdivision b and section 67 subdivision e; and even if this suit were brought under section 70 subdivision e, consent to try the case in the United States Court having been withheld, the trial court was without jurisdiction to proceed with the trial of it, and properly sustained the plea to the jurisdiction.

Bardes vs. First Nat'l Bank, 178 U. S. 524.

Hull vs. Burr, 153 Fed. 949-950.

Skewis vs. Bartheli, 152 Fed. 534.

Gregory vs. Atkinson, 127 Fed. 183.

Collier on Bankruptcy, 7th Ed. p. 845.

Congressional Record, Vol. 36, Pt 1, pp. 1034-35-36, dated January 21st, 1903.

The Bardes decision, 178 U. S., is conclusive upon the proposition that under the act as passed in 1898 suits brought by the trustee, whether arising under subdivisions of sections 60, 67 or 70, could not be maintained in the National Courts without the consent of the defendant. The process of reasoning and authorities cited in reaching the conclusion that was announc-

ed in that case, apply with equal force and persuasiveness to the proposition that, under the law as it is written at the present time, suits by trustees, save those arising under the named subdivisions of sections 60 and 67, depend upon the consent of the defendant insofar as trials in the Federal Courts are concerned.

In the Bardes case the question presented was:

"Whether or not under the Act of 1898 a District Court of the United States, in which proceedings in bankruptcy have been commenced and are pending, under the act, has jurisdiction to entertain a suit by the trustee in bankruptcy against a person holding and claiming as his own property alleged to have been conveyed to him by the bankrupt in fraud of creditors."

And the following conclusion was reached in reference thereto:

"Congress, by the second clause of section 23 of the present Bankruptcy Act appears to this court to have clearly manifested its intention that controversies not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy, to assert a title to money or property as assets of the bankrupt against strangers to those proceedings should not come within the jurisdiction of the District Courts of the United States unless by consent of the proposed defendant."

This decision was rendered from a consideration of the whole act. The court found that notwithstanding the seventh clause of the second paragraph of the Act, creating courts of bankruptcy, and the jurisdiction given therein to the bankruptcy courts, "to cause the estate of the bankrupt to be collected, reduced to

money and distributed and to determine controversies in relation thereto," yet, that previous decisions, construing practically the same language in prior acts of bankruptcy, as well as the act itself considered in its entirety, and in comparison with previous acts, led to the inference and conclusion that:

"The provisions of the second clause of section 23 of the Bankruptcy Act control and limit the jurisdiction of all courts, including the several district courts of the United States over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors."

In reaching this conclusion, the court took into consideration and seemed to attach significance and consequence to the clause "except as herein otherwise provided," which was added to the seventh paragraph of section 2, and also the caption or title to section 23 which reads "Jurisdiction of United States and State Courts." It was stated that the words "herein otherwise provided" evidently referred to section 23 of the Act, and that the general scope and object of said section was indicated, by reason of the fact that titles appear for the first time in the act of 1898, by its title.

Now that was the law in 1903 when the amendment of that year, evidently framed for the purpose of meeting some of the effects of this decision, was enacted. Let us see just what the amendment was and what, judging from the history and nature of the

amendment, its purpose was. To the second paragraph of section 23 which originally read:

"Suits by trustees can only be brought or prosecuted in courts where the bankrupt, whose estate is being administered by such trustee, might have prosecuted them, if proceedings in bankruptcy had not been instituted, except by consent of the proposed defendant."

was added the following:

"Except suits for the recovery of property under section sixty subdivision b and section sixty-seven subdivision e."

Coincident with the above amendment was added to subdivision b of section 60 and subdivision e of section 67 and subdivision e of section 70, these words:

"And for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction had bankruptcy not intervened, shall have concurrent jurisdiction."

The history of this legislation is that all of the amendments originated in the House of Representatives, and as the bill left the House, it contained not only the additions which now appear to section 60 subdivision b and section 67 subdivision e and section 70 subdivision e, but the amendment to subdivision b of section 23, was made to read as follows:

"Except suits for the recovery of property under section sixty subdivision b and section sixty-seven subdivision e and section seventy subdivision e."

When the bill was before the Senate the words "and section 70 subdivision e" were stricken from this

last amendment and the bill so changed became a law. But the addition to subdivision e itself of section 70 was not eliminated—most likely through inadvertence, and that subdivision, together with subdivision b of section 60 and subdivision e of section 67, appears, in the present law, different, to the extent of the addition quoted above, from what it was when the Bardes case was decided.

Now what is the effect of this addition to subdivision e of section 70? Certainly it cannot be contended that its effect is any different from the effect of the amendments to subdivision b of section 60 and subdivision e of section 67; or that either of said last named amendments were necessary in order to give the District Courts jurisdiction of independent suits filed by the trustee under the said subdivisions of sections 60 and 67, because the Bardes case expressly decided that the District Court of the United States could, with the proposed defendant's consent, entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property.

Nor can it be contended with sound reason that the effect of such amendment was to confer jurisdiction on the United States District Court of such cases without the consent of the defendant, because if that were true the amendments to start without would be wholly unnecessary, the Bardes decision being substantially that the amendment to subdivision b of section 23

would alone have given the District Courts jurisdiction. In that case it was held that the provisions of the second clause of section 23 control and limit the jurisdiction of all courts and it follows if the amendment to that subdivision provided that suits arising under subdivision b of section 60 and subdivision c of section 67 could be brought in the District Court without the consent of the defendant, then the addition to those subdivisions themselves insofar as conferring jurisdiction on the District Court without the consent of the defendant is concerned, was wholly unnecessary and surplusage.

Again, if the amendment to subdivision c of section 70 had the effect to confer jurisdiction on District Courts without the consent of defendants, what possible purpose could there have been in striking subdivision c of section 70 from the amendment to the subdivision of section 23. There is obviously no meaning in that omission unless it was to exclude cases arising under subdivision c of section 70 from the effects of the new legislation, and to "leave such controversies to be tried and determined, for the most part, in the local courts of the state to the greater economy and convenience of litigants and witnesses."

Besides that, if the amendments to the subdivisions of sections 60, 67 and 70 had the effect to confer upon the District Courts jurisdiction of cases arising under those subdivisions without the consent of the de-

fendant, why amend section 23 at all? Such amendment in that event would be worthless and meaningless and the omission of section 70 from it would be wholly without significance.

However that may be, the frame work of the statute remained the same after the amendment as it was before. The words "except as hereinafter provided" still appear in the second paragraph of section 2 and they obviously still have reference to section 23. The caption or title to section 23 defines the jurisdiction of the United States and State Courts, and remained the same after, as it was before, the amendment, and has just the same significance. All the reasons and argument by which the court in the Bardes case reached the conclusion that "Congress by the second clause of section 23 of the Bankruptcy Act appeared to have manifested its intention that suits by the trustee against strangers cannot be brought in the District Courts of the United States except by the consent of the defendant," obtain now after the amendment, just exactly as they did when first stated.

Now, giving to the language employed in the amendment to subdivision e of section 70, as well as to the amendments to the subdivisions of sections 60 and 67, the very broadest meaning of which the same will admit, it does not purport to do more than confer jurisdiction concurrent with the state courts on the courts of bankruptcy for the purpose of recovery provided

for in the subdivision. That is very different from providing jurisdiction in such cases without the consent of the defendant as appears from Ex parte Wisner, 203 U. S.; especially when there is a plain provision in the same act stating that suits by the trustee shall not be brought in the national courts without the consent of the defendant, except where the bankrupt himself might have brought them if proceedings in bankruptcy had not been instituted. The incurable difficulty with the plaintiff in error is that subdivision 2 of section 23 remains, as to this case, just as it was in the act of 1898. There is a wide difference, as shown in the decision of Skewis vs. Barthall, in conferring jurisdiction of the subject matter of a suit and conferring jurisdiction of the subject matter without the consent of the defendant.

In the Wisner case it was held that while, under the Judiciary Act, the Circuit Court of the United States has jurisdiction of suits between citizens of different states, yet that jurisdiction cannot be exercised without the consent of the defendant unless the plaintiff resides in the state where the suit is brought.

It seems perfectly right to say that if the purpose of the amendment to subdivision e of section 70 had been to confer jurisdiction on the bankruptcy courts without the consent of the defendant, the amendment would have so stated.

The District Court of the United States has no

jurisdiction of suits at law or in equity between private parties except where by special provision of an Act of Congress a District Court has the powers of a Circuit Court or is given jurisdiction of a particular class of civil suits.

In the Bardes decision it was stated that jurisdiction is given by the Bankruptcy Act to the District Courts of the United States to entertain jurisdiction of suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property with the defendant's consent, but not otherwise.

Now it may be that the amendment to subdivision e of section 70 confers jurisdiction upon the District Court of the United States in a class of cases that jurisdiction, even with the consent of the defendant, prior to the amendment, did not exist. We do not think that is the meaning of it because we cannot see why the Bardes decision did not apply to a case arising under subdivision e of section 70, as well as to the facts that were before the court in that decision. We recognize, of course, that there is some difference between a cause of action arising under subdivision e of section 70 and the cause of action that was before the court in the Bardes case; and that that decision does not necessarily hold that even with the defendant's consent, the United States District Court would have jurisdiction of cases arising under section 70. On that account and to eliminate all doubt upon the question it may have been the

purpose of the amendment to give jurisdiction to the District Court of the United States over such causes of action.

Either that construction or the construction that it is merely declaratory of the law as it existed would give the amendment force and meaning and would be a sounder and safer interpretation than to hold that the omission of subdivsion e of section 70 from the second clause of section 23 is without significance or effect; or to hold that jurisdiction is given over causes of action arising under subdivision e of section 70 without the consent of the defendant, when the amendment itself does not state that such consent is unnecessary, and the plain recital in subdivision b of section 23 does state that suits by trustees shall only be brought in courts where the bankrupt might have brought them if proceedings in bankruptcy had not been instituted, unless by the consent of the proposed defendant.

We can see no application in the two cases referred to in the brief of opposing counsel, Bush vs. Elliott, 202 U. S., and Frank vs. Bolkommer, 205 U. S. 521, to this case. We can not get the same inferences that seem to be gotten by plaintiff in error from the expressions of this court. On the contrary, we construe the language in those cases and the quotations to mean just exactly what they say, and furthermore, to mean

nothing at all inconsistent with the position we are assuming in this case.

In the Bush case, clause two of section 23 is declared to affect the jurisdiction of all courts. We cannot see that anything more is said or to be inferred than that under that clause, prior to the amendment, the trustee could not bring any action against third parties except by the consent of the defendants. Since the amendment, of course, he can bring suits under 60 b and 67 e, but there is no implication, as seems to be contended, that since said amendment the trustee can bring a suit arising under 70 e.

To the same effect is the quotation in the Frank case, both attaching, as we understand, determining and controlling importance to the subdivision of section 23 insofar as the jurisdiction of the courts is involved.

We have referred the court to the opinions of Judge Shelby of the Circuit Court of Appeals, Judge Reed of the District Court of Iowa and Judge Adams, now a member of the Court of Appeals of the St. Louis Circuit. We submit that the arguments they present and the conclusions they have reached are stronger and superior to the opinion of Judge Pollock in the Hurley case.

We respectfully urge that considering the history of the legislation, the weight of authority and the best reasoning and logic involved in the matter, the

trial court was correct in his ruling, and that the question certified to this court should be answered to the effect that the trial court had no jurisdiction in the premises and that the suit was properly dismissed.

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HARRIS, TRUSTEE, *v.* FIRST NATIONAL BANK OF MT. PLEASANT.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

No. 98. Argued January 21, 1910.—Decided February 21, 1910.

Quære, and not decided, whether under § 70*e* of the Bankruptcy Act the suits therein referred to can be brought in the bankruptcy court without the consent of the defendant. See contrary views expressed in *Hull* v. *Burr*, 153 Fed. Rep. 945; *Hurley* v. *Devlin*, 149 Fed. Rep. 268.

Section 70*e* of the Bankruptcy Act provides for avoiding transfer of the bankrupt's property which his creditors might have avoided, and for recovery of such property, or its value from persons not *bona fide* holders for value. It does not, either with or without consent of defendant, give the bankruptcy court jurisdiction of a suit to recover property held by defendant but which, if the allegations of the complaint are true, belonged to the bankrupt and passed to the trustee.

The bankruptcy court has not jurisdiction of a suit against a bank to recover securities held by it for indebtedness of the bankrupt on the ground that the debt had been paid.

THE facts are stated in the opinion.

Mr. W. L. Estes, with whom *Mr. Hiram Glass*, *Mr. John J. King* and *Mr. A. L. Burford* were on the brief, for defendant in error.

Mr. Chas. S. Todd, *Mr. Geo. Q. McGown*, *Mr. Jno. A. Hurley*, *Mr. S. E. Webber*, for plaintiff in error, submitted.

MR. JUSTICE DAY delivered the opinion of the court.

This case presents the single question of the jurisdiction of the District Court of the United States to entertain a suit

brought by Harris as trustee in bankruptcy against the First National Bank of Mt. Pleasant, Texas.

The petition alleged that Hargrove, the bankrupt, was indebted to the defendant bank for an overdraft in the sum of $2,000; that to secure the payment of the same Hargrove delivered into the bank's possession as collateral security certain notes; that at the time of the adjudication in bankruptcy Hargrove had paid the overdraft in full.

Further, the petition alleged that at the time Hargrove was adjudged a bankrupt the bank had in its possession two certain promissory notes, which had been signed by one McGee as principal and by Hargrove as surety. That prior to the bankruptcy Hargrove paid the notes and thus became entitled to the same. That defendant refuses to account for said notes, and wrongfully withholds them from the trustee. The prayer of the petition is that the bank be required to surrender to the trustee the notes so pledged as collateral security, and also the notes paid by Hargrove as surety, or, in default thereof, judgment against the bank in the sum of $3,500, the value of all the notes. Upon issue made as to its jurisdiction the District Court held it was without jurisdiction and dismissed the suit.

In *Bardes* v. *Hawarden Bank*, 178 U. S. 524, this court held that under § 23 of the Bankruptcy Act of 1898 the District Court of the United States could, by the consent of the defendant, and not otherwise, entertain suits by the trustee against third persons to recover property conveyed by the bankrupt before the institution of proceedings in bankruptcy.

Subsequently, Congress, by the act of February 5, 1903, 32 Stat. 797, c. 487, amended certain sections of the Bankruptcy Act. To § 23*b*, which provided that suits by the trustee should only be brought in courts where the bankrupt, whose estate was being administered by the trustee, might have brought them if proceedings in bankruptcy had not been instituted, unless by the defendant's consent, these words were added: "*Except suits for the recovery of property*

under section sixty, subdivision b, and section sixty-seven, subdivision e."

Subdivision *b* of § 60 made provision for the recovery of preferences given by the bankrupt within four months before the filing of the petition in bankruptcy. To that subdivision these words were added: "*And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"

Subdivision *e* of § 67 made provision for setting aside fraudulent conveyances, and the recovery of property so conveyed at the suit of the trustee. To that subdivision these words were added: "*For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"

A consideration of these amendments, having reference to the recovery of preferences and of property fraudulently conveyed, shows that they cannot include the action under consideration here. Nor is it claimed that they are sufficient of themselves to authorize the present suit. Reliance is had on the amendment made by the act of February 5, 1903, of subd. *e* of § 70. We give that subdivision, putting the amendment in italics:

"*e.* The trustee may avoid any transfer by the bankrupt of his property which any creditor might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"

It is to be noted that § 70, subd. *e*, is not mentioned in the

amendment to § 23, enlarging the jurisdiction of the Federal court to entertain suits without the consent of the defendant. And it has been held that suits under § 70, subd. *e*, can only be brought in a court of bankruptcy with the consent of the defendant. *Hull* v. *Burr*, 153 Fed. Rep. 945. The contrary view was taken in *Hurley et al.* v. *Devlin*, 149 Fed. Rep. 268.

But we do not find it necessary to pass upon that question. Assuming for this purpose that actions may be brought by trustees in the courts of bankruptcy in cases coming within the terms of § 70, subd. *e*, without the consent of defendant, we do not think the present action is one of that character.

That subdivision provides for avoiding transfers of the bankrupt's property which his creditors might have avoided, and for recovery of such property, or its value, from persons who are not *bona fide* holders for value. In this action no such transfer is alleged, no attack is made upon a transfer by the bankrupt which would have been void as to creditors. The petition seeks to recover property held by the bank, if the allegations are true, which belonged to the bankrupt, and consequently passed to the trustee as the representative of the bankrupt's estate. The recovery sought is of property held for the bankrupt estate which the defendant wrongfully refused to surrender. The District Court was right in denying jurisdiction of the suit, and its judgment is

Affirmed.